Ruchi v Republic (Criminal Appeal E033 of 2021)
[2024] KEHC 13292 (KLR) (4 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13292 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E033 OF 2021

AK NDUNG'U, J

NOVEMBER 4, 2024

BETWEEN

WILLIAM EKIRU RUCHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original Sentence in Nanyuki CM Sexual Offences Case No 66 of 2019– L. Mutai CM)

JUDGMENT

1. The Appellant in this appeal, William Ekiru Ruchi was convicted after trial of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on diverse dates between 4th day of August 2019 and 10th day of August 2019 in Laikipia Central Sub-county of Laikipia County, intentionally and unlawfully caused his penis to penetrate the vagina of JM a girl aged 16 years. On 08/11/2019, he was sentenced to ten (10) years imprisonment.
2. He was aggrieved by the pronounced sentence hence his appeal to this court. He filed 'mitigation grounds of appeal' and raised the following grounds;
    i. That he is a first offender.
    ii. That he responded positively in rehabilitation process.
    iii. That he is a reformed person.
    iv. He is the sole breadwinner to his family.
3. He also filed supplementary mitigation grounds of appeal and raised the following grounds;
    i. That he is remorseful and will never engage in a criminal activity or commit a sexual offence.

ii. He has rehabilitated and has maintained good discipline while serving his term of imprisonment.

iii. That he has acquired a vocational course grade 3 and 2 in welding and metal works.

iv. That he is a holder of several certificates in bible courses and he is a practicing Christian.

4. He submitted that although sentencing is a discretion of the trial court, this court has unlimited powers of revision of the sentence pursuant to Article 165(3) of the *Constitution*. He urged the court to consider his application and consider him for community service order or probation or reduce his sentence to a lesser term considering the time he spent on remand during trial so that he can reunite with his young family who were left destitute. Further that everybody deserves a second chance in life and urged the court to look at his case on rehabilitative rather than retributive terms.

5. The Respondent counsel in opposing the appeal submitted that the Appellant did not demonstrate that the sentencing court took an irrelevant factor or a wrong principle was applied or the sentence is so excessive as was discussed in *Shadrack Kipkoech Kogo v R* Eldoret Criminal Appeal No.253 of 2003 and *Bernard Kimani Gacheru v Republic* (2002) eKLR to allow this court interfere with the sentence.

6. She submitted that he was unremorseful in his mitigation and the court observed that he had taken advantage of a young girl hence the need for a deterrent sentence. That he also revealed that he had a small child and wife but preyed on a school going girl. That though he claims to have rehabilitated, he should serve his sentence to entirety and that litigation must come to an end and if this doctrine is not upheld, it will lead to continuous backlog to the criminal justice system. She submitted that section 8(4) of the *Sexual Offences Act* prescribe a sentence of not less than 15 years and therefore, the sentence of 10 years imposed was not only lawful but lenient in the circumstances.

7. I have had due regard to the appeal herein, the grounds relied upon and the response by the state. It is imperative to state at this early stage that while it is within a person's right to appeal against sentence, sentence remains the preserve of and it is at the discretion of the trial court and such an appeal must be restricted to the known parameters in law within which an appellate court can interfere with a sentence.

8. There is no opportunity at the appellate stage for fresh mitigation and neither does the court have jurisdiction to entertain an appeal on ground of reformation of a convict or acquired skills at prison. Such considerations are only relevant when issues of remission of sentence or exercise of the power of mercy are at play.

9. The Appellant was charged with contravening the provisions of section 8(1) as read with section 8(3) of the *Sexual Offences Act* which provides thus;

> " A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

10. The charge sheet and the evidence on record shows that the complainant was 16 years old. The correct section that the Appellant was supposed to be charged under is Section 8(4) of the *Sexual Offences Act* which provides that;

> " (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

11. The charge sheet was not amended and the trial court convicted and sentenced him under section 8(3) of the Act. So, to mean that he was charged and convicted under the wrong provisions of the Act. However, it is my view that this is an error that is curable under section 382 of the *Criminal Procedure Code* which states that;

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

12. Section 8(4) of the Act provides for a sentence of not less than 15 years. The Appellant was sentenced to 10 years imprisonment. The trial court did not proffer any reason why the sentenced was reduced instead of sentencing as the law provides.

13. While sentencing him, the trial court considered his mitigation. In his mitigation before the trial court, he informed the court that he had a family with a 6month old baby. That he was looking after his niece and he was educating his two sisters. The trial court considered his mitigation and noted that although he was a first offender, the offence was very serious as he chose to prey on a young girl though he revealed to court that he had a family.

14. As submitted by the Respondent's counsel, sentencing is at the discretion of the trial court and an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (*Ogolla S/o Owuor v R* {1954} EACA 270).

15. Apart from the mitigating factors, the Appellant did not allege any of the above principles. It is my considered view that the sentence imposed was lenient given the circumstances of the case. He has already benefited from a reduction of sentence as he was sentenced to 10 years imprisonment instead of 15 years as the law prescribe. I note the state has not sought enhancement of the sentence and in those circumstances, I will let the matter lie.

16. With the result that the appeal herein has no merit and is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF NOVEMBER 2024

A.K. NDUNG'U

JUDGE